Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Telecommunications Services Inside Wiring	)	CS Docket No. 95-184
	)	
Customer Premises Equipment	)	
	)	
In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992:	)	MM Docket No. 92-260
	)	
Cable Home Wiring	)	

COMMENTS OF U S WEST, INC.

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September 25, 1997

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U S WEST, Inc. ("U S WEST") herein submits its comments regarding the Federal Communications Commission's ("Commission") Further Notice of Proposed Rulemaking in the above-captioned matter.[1] Through its two main subsidiaries, U S WEST Media Group, Inc. ("U S WEST Media Group") and U S WEST Communications Group, Inc. ("U S WEST Communications Group"), U S WEST provides cable service directly to over five million subscribers -- many of whom

[1] In the Matter of Telecommunications Services Inside Wiring Customer Premises Equipment; In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring, CS Docket No. 95-184, MM Docket No. 92-260, Further Notice of Proposed Rulemaking, rel. Aug. 28, 1997 ("FNPRM").

reside in multiple dwelling units ("MDU").[2] The Commission's FNPRM focuses primarily on issues related to inside wiring located in MDUs and will have a direct impact on the ability of MDU tenants to exercise choice in their selection of video programming service providers. U S WEST urges the Commission to protect the rights of MDU tenants to choose their providers and the rights of cable operators and other parties which have been lawfully established by statute, common law, or contract. Competition and consumer choice can only exist where parties have an opportunity to exercise their rights unencumbered by overly-intrusive regulation and free from the inequity presented by rules which potentially favor the interests of certain parties over others. U S WEST submits these comments in support of those goals.

I. INTRODUCTION AND SUMMARY

In the FNPRM and in several previous proceedings, the Commission has proposed to modify its existing cable inside wiring rules to encourage the creation of additional competition and promote consumer choice in the video programming marketplace.[3] In the instant proceeding, the Commission is focused primarily on the disposition of cable inside wiring upon termination of an operator's legal right to serve the premises. U S WEST is concerned that the Commission's proposed approach will not promote additional competition and consumer choice, but will

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[2] U S WEST Media Group provides cable service under the "MediaOne" brand name.

[3] In the Matter of Telecommunications Services Inside Wiring Customer Premises Equipment, Notice of Proposed Rulemaking, 11 FCC Rcd. 2747 (1996); In the Matter of Implementation of the Cable Television Consumer Protection and

instead serve to create a one-wire, one-provider standard in the MDU segment of the marketplace. If the proposed rules are adopted, MDU tenants will be prevented from experiencing real choice for video programming and other telecommunications services. Notwithstanding the time and effort that the Commission has devoted to this matter, the Commission should strive to develop a solution which truly enhances an MDU subscriber's choice in the marketplace.

First and foremost, U S WEST believes that the Commission lacks jurisdiction to determine the disposition of "home run" wiring. Section 624 of the Cable Act specifically limits the Commission's jurisdiction to "inside wiring."[4] As discussed below, Sections 4(i) and 303(r)[5] of the Communications Act cannot be used by the Commission to expand its jurisdiction in a manner inconsistent with Section 624.

In addition to its jurisdictional concerns regarding the Commission's proposals, U S WEST has the following specific concerns with regard to the FNPRM:

- The Commission's conclusions seem based on assumptions which are not supported by fact, e.g., that space limitations preclude entry in many MDUs and that MDU owners will act in the best interest of their tenants.
- Absent modification, the Commission's proposed rules would affect the legal rights of service providers and property owners. Artificial presumptions or other modifications of contractual, common law, or statutory rights by the Commission are not proper.

Competition Act of 1992: Cable Home Wiring, First Order on Reconsideration and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 4561 (1996).

[4] 47 U.S.C. § 544(i).

[5] 47 U.S.C. § 154(i); 47 U.S.C. § 303(r).

- The Commission's options for the disposition of building wire unintentionally disadvantage incumbent operators in negotiations with building owners where a building owner refuses to purchase the existing wiring at a reasonable price.

To reach its goals of promoting real competition and consumer choice, the Commission needs to address these concerns and develop solutions which put the control of telecommunications service provider decisions in the hands of the most directly impacted party -- the consumer.

II. THE COMMISSION LACKS JURISDICTION OVER THE DISPOSITION OF "HOME RUN" WIRING OR ANY OTHER WIRING OUTSIDE OF THE UNITS OF INDIVIDUAL SUBSCRIBERS

The Commission provides extensive analysis in the FNPRM of its authority to regulate activity beyond cable inside wiring. However, U S WEST respectfully disagrees with the Commission's reliance upon Section 4(i) and 303(r) of the Communications Act to expand its jurisdiction over cable inside wiring to include "home run" wiring.[6] The Commission's proposal to include "home run" wiring is, inter alia, plainly inconsistent with the specific statutory authority in Section 624(i). That Section states:

> Disposition of cable upon termination of service. Within 120 days after the date of enactment of this subsection [Oct. 5, 1992], the Commission shall prescribe rules concerning the disposition, after a subscriber to a cable system terminates service, of any cable installed by the cable operator *within the premises* of such subscriber. [*Emphasis added*]

[6] Defined in the FNPRM to be the dedicated line from the common feeder or distribution panel to the individual tenant's premises. FNPRM ¶ 7.

In addition to the plain language of Section 624, the legislative history makes clear that Congress did not intend for these rules to govern wiring outside of the premises of a subscriber.

> This section deals with internal wiring within a subscriber's home or individual dwelling unit. In the case of multiple dwelling units, this section is not intended to cover common wiring within the building, but only the wiring within the dwelling unit of individual subscribers.[7]

Congress could not have been clearer in its intention that the Commission adopt rules only with respect to wiring inside of subscriber's dwelling units. Home run wiring is plainly not within the dwelling units of individual subscribers as contemplated by Section 624. Since it is clearly limited in its jurisdiction by Section 624, the Commission proposes to use the general authority provided by Sections 4(i) and 303(r) to "establish procedures for the disposition of MDU home run wiring upon termination of service."[8] Section 4(i) of the Communications Act provides:

> Duties and powers. The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act [47 U.S.C. §§ 151 et seq.], as may be necessary in the execution of its functions.

Section 303(r) provides:

> Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act [47 U.S.C. §§ 151 et seq.], or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

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[7] H.R. Rep. No. 628, 102d Cong., 2d Sess. 119.

[8] FNPRM ¶ 54.

While such jurisdiction might be appropriate in circumstances where the Communications Act is silent as to the Commission's jurisdiction, it is certainly not appropriate here where the Commission's jurisdiction over cable inside wiring is explicitly limited to that wiring located within the premises of subscribers.[9] The statutory maxim *expressio unius est exclusio alterius* -- the expression of one is the exclusion of others -- is applicable here. Congress has expressly provided the extent of the Commission's jurisdiction as to cable inside wiring.[10] Here, expansion of the Commission's jurisdiction to include home run wiring is clearly inconsistent with the express language of Section 624, therefore, Sections 4(i) and 303(r) should not be used by the Commission as vehicles to secure jurisdiction over wiring outside of a subscriber's dwelling unit.

III. KEY ASSUMPTIONS WHICH FORM THE BASIS FOR THE COMMISSION'S TENTATIVE CONCLUSIONS ARE NOT SUPPORTED BY THE FACTS

The Commission has made a number of key assumptions in this proceeding which are based upon the claims of alternative service providers in various filings and *ex parte* presentations. Unfortunately, many of these claims are not supported by fact. Unlike environments where the Commission is attempting to introduce competition, a mature and competitive market currently exists for the provision of

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[9] Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc., 467 U.S. 837, 842-43, reh'g denied 468 U.S. 1227 (1984) (Where Congress "has directly spoken to the precise question at issue . . . that is the end of the matter," and the agency must give effect to Congress' expressed intent.)

[10] See, e.g., Haas v. Internal Revenue Service, 48 F.3d 1153, 1156 (11th Cir. 1995) ("Where Congress knows how to say something but chooses not to, its silence is controlling.") (citations omitted).

video service to MDUs. Before establishing rules governing the disposition of cable inside wiring in MDUs upon termination of service, the Commission must ensure that any assumptions upon which it proposes to rely can be substantiated.

As a prime example, alternative service providers, in their filed comments and *ex parte* presentations, have claimed that they are unable to provide competing service to many MDUs because those properties are severely constrained by space limitations and other access problems. However, no demonstrable evidence has been presented by those providers to the Commission which supports their claims. In fact, evidence to the contrary has been previously submitted in this proceeding which demonstrates that it is relatively easy to deploy a second wire in most MDUs.[11] Rather than being grounded in fact, U S WEST believes that the alternative providers' space limitation and property access claims are: (1) significantly exaggerated; (2) a result of MDU owners having large financial incentives to limit multiple provider access; and (3) simply an issue of MDU owners not wanting their properties to be inconvenienced.

It is clear from the record in this proceeding that the alternative service providers which have filed comments are generally not interested in two-wire competition -- competition which would provide MDU consumers a true choice for multiple telecommunications services. Instead, they would prefer that the

[11] See, e.g., Comments of Time Warner Cable and Time Warner Communications, CS Docket No. 95-184, filed Mar. 18, 1996 at Exhibit D. U S WEST itself is engaged in two wire competition in California, among other states. For example, MediaOne provides competing service over separate facilities with OpTel, Inc. at Casa de Marina in Los Angeles, California. See Exhibit A.

Commission refrain from fostering real competition and simply bestow upon them the legal authority to displace the incumbent provider. This is not an appropriate solution. MDU tenants receive no benefits from the wholesale replacement of one service provider for another. Real competition can only be accomplished if two-wire alternatives are facilitated.

As the Commission is certainly aware, the MDU segment of the video programming marketplace is already highly competitive. The only item lacking in this market segment is the ability of MDU consumers to independently select their service providers. All video programming providers, including cable, SMATVs, MMDS, DBS, OVS, and LMDS operators, have the ability and desire to serve this segment and are actively pursuing MDU owners. The Commission has proposed making the MDU owners the "gatekeepers" for selecting tenant service providers. In most cases, this approach is not in the best interests of tenants.[12] Increasingly, MDU owners are offered significant financial incentives, e.g., a per door "passing fee" or revenue sharing agreements, to allow a service provider to access and serve their properties. These cash payments can create a substantial conflict of interest between a landlord's appetite for revenue and a tenants desire to receive service

[12] The Commission's tentative conclusion that MDU owners will be discouraged from ignoring their residents' interests in competitive real estate markets, FNPRM ¶ 47, does not justify placing MDU owners in a gatekeeper role. Moreover, this conclusion requires a resident to feel so strongly about its video service as to move out as a result of a change in service providers. U S WEST does not believe that MDU residents should have to move out of their apartments merely to have a choice of cable service providers.

from their preferred provider. U S WEST urges that the Commission take steps to ensure that these potential conflicts do not detrimentally impact consumer choice.

To ensure that MDU tenants' interests are not compromised by financial incentives offered to MDU owners, the Commission should forbear from applying any of its proposed inside wiring disposition rules where the MDU owner receives monetary compensation from the new provider. This would include the rules for building-by-building and unit-by-unit disposition of cable wiring. By doing so, the Commission can ensure that the interests of MDU tenants are protected from any potential conflicts created by artificial incentives. Tenants could then rely on their property owners to make decisions based solely on considerations which serve their interests.

IV. THE COMMISSION SHOULD NOT IMPOSE RULES WHICH AFFECT THE LEGAL RIGHTS OF MULTICHANNEL VIDEO DISTRIBUTORS OR PROPERTY OWNERS

In crafting rules governing the disposition of cable wiring, the Commission must be careful not to impose rules would which affect the existing legal rights of incumbent service providers or property owners. No presumptions or modifications of contractual, common law, or statutory rights by the Commission are necessary or appropriate. While the Commission has acknowledged both contractual and statutory rights in the FNPRM, there are other legal rights, in common law and equity, which are just as legitimate and must be protected from any modification by the Commission's actions in this proceeding. Common law and equitable rights may arise out of an infinite variety of circumstances. The determination of such rights is the exclusive province of the courts. There is no basis upon which the

Commission may establish a presumption as to whether a court will decide if a cable operator is likely to have an enforceable right to continue providing service to a particular property. Not interfering with or prejudging any legal rights is entirely consistent with the Commission's stated aim to "not grant MDU owners any additional rights, but simply establish a procedural mechanism for MDU owners to enforce rights they already have."[13]

Because the proposed rules apply only where the incumbent does not possess a legal right to continue serving a property, the existence of a legally enforceable right is a threshold issue in the application of the rules. U S WEST therefore submits that the Commission's rules should provide for a stay in the event that a wiring owner initiates a court action to determine its right to continue providing service to a property. Such a procedure will ensure that a provider's enforcement of its legal rights are not an exercise in futility.[14]

In addition, the Commission should refrain from applying its proposed rules in states which have passed right-of-access laws. In a number of states, cable operators and alternative providers have been provided with the right to access and provide service to MDU tenants. Competition already exists as a result of this state statutory authority. These locations do not require nor would they benefit from application of the Commission's proposed rules. The states where right-of-access

[13] FNPRM ¶ 47.

[14] Given the high cost of litigation, incumbent providers (and MDU owners) have the incentive to be judicious in their use of the court system.

laws have been passed include: Connecticut, Florida,[15] Illinois, Kansas, Maine, Massachusetts, Minnesota, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, and Wisconsin. The Commission should specifically exempt any state where there is a statutory right of access from application of its proposed inside wiring provisions.

Additionally, the Commission should not override any existing contracts which specify the disposition of building wiring. Where a building owner and service provider have previously negotiated and agreed upon the terms associated with the ownership of building wiring, the Commission should not insert itself in those negotiations after-the-fact. To do so would be unreasonable and would violate the parties' rights under the due process clause of the Fifth Amendment to the Constitution.[16] Furthermore, the Commission should not impair the ability of building owners and service providers to negotiate the ownership and disposition of wiring in future agreements. Such restrictions would only serve to discourage service providers from making substantial investments in MDU properties (or rebuilding older systems) and serving those properties with the latest technology. MDU tenants would again be the parties who suffered the consequences of such an action.

[15] Limited to access to condominiums.

[16] United States Constitution, Amendment V.

V. THE COMMISSION'S OPTIONS FOR THE DISPOSITION OF BUILDING WIRING DO NOT PROVIDE SUFFICIENT BALANCE IN NEGOTIATIONS

The Commission has proposed three alternatives for incumbent providers who own the wiring in a given MDU when they terminate service to a property: (1) they can sell the wiring to the building owner (or alternative provider where the building owner chooses not to purchase the wiring), (2) they can abandon the wiring in place, or (3) they can remove the wiring from the premises. In cases where an incumbent chooses to sell the wiring, the Commission has proposed giving a period of 30 days to negotiate the sale. Should the negotiations fail, then the incumbent who owns the wiring has two choices: it must either abandon the wiring or remove the wiring. While this approach might work in theory, U S WEST's considerable experience in this area suggests that it has little chance of success in the real world because of the total bargaining power it provides to MDU owners.

For example, under the Commission's proposed rules, incumbent service providers who elect to sell their inside wiring are placed in a no-win situation if a building owner unreasonably refuses to purchase the existing wiring after good faith negotiations by the incumbent. In such situations, the incumbent is then faced with equally poor choices of abandoning the wiring, and thus forfeiting its opportunity to be reimbursed for its value, or removing the wiring, which requires additional time and expense.

To overcome this imbalance, U S WEST proposes that the Commission adopt an additional provision to the current alternatives which would allow an incumbent operator to retain ownership of the wiring and continue to be allowed to restrict its

use where the incumbent operator offers to sell the wiring and the building owner refuses to purchase it at a "reasonable" price. Once an MDU owner or alternative provider knows that it can purchase the wiring at a reasonable price, the purpose of the rules will have been fulfilled.

U S WEST believes that it would be helpful if the Commission could establish a reasonable default price for cable inside wiring. The default price must, however, reflect what it would cost the new provider to put in its own wiring in terms of labor and materials. This reflection of the true value would provide both the buyer and seller with the proper incentives to transfer the wiring. An artificially low (or high) rate would frustrate the seamless handoff that the rules are designed to engender. In any event, should the MDU owner refuse a reasonable offer to transfer the wiring, then the additional provision suggested by U S WEST above should apply and ownership of the inside wiring should remain unchanged.

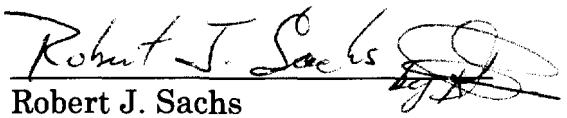
VI. CONCLUSION

The Commission should strive to develop rules which enhance the choices of tenants, while protecting the legal rights of all parties in the MDU marketplace. Such tenant choice can only be accomplished by the creation of an environment which encourages two-wire competition. Although the record in this proceeding demonstrates that two-wire competition is indeed technically feasible, such head-to-head competition is not favored by alternative service providers who are simply seeking to displace the incumbent provider's service with their own. This situation is exacerbated by the fact that MDU owners often have financial interests which conflict with a tenant's interest in having a choice of service providers. In such a

milieu, the wholesale replacement of one service provider for another does nothing to advance consumer choice. Competition and consumer choice can only exist where subscribers have a choice of providers independent from the interests of third-party gatekeepers.

Respectfully submitted,

U S WEST, INC.

By: 

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Its Attorneys

Of Counsel,
Dan L. Poole

September 25, 1997

EXHIBIT A

Exhibit A

OpTel SM
The choice is clear.

June 18, 1997

Via Telecopy and U.S. Mail

Matthew P. Zinn, Esq.
Corporate Counsel
MediaOne
550 N. Continental Blvd., Suite 250
El Segundo, California 90245

Re: Casa de Marina Apartments, 12600 Braddock Drive, Los Angeles, California

Dear Mr. Zinn:

OpTel is in receipt of your letter dated June 16, 1997 addressed to Michael Katzenstein concerning the referenced property. By your letter and voice mail message, it appears that you have been misinformed regarding OpTel's cable system and service at the Casa de Marina Apartments. I am more than happy to provide you with the correct information.

You are correct that OpTel, pursuant to a service agreement with the owner of the property, has constructed its own cable television system at the Casa de Marina Apartments. OpTel has not used any portion of an existing cable television system, including the drops in use by MediaOne. OpTel has constructed an entirely new cable distribution system, including new drops to, and new outlets in, each unit.

OpTel is providing its basic and extended basic cable television services to all residents of the property pursuant to a bulk cable service agreement with the owner of Casa de Marina Apartments. OpTel is being compensated by the owner for its cable services. OpTel is not providing service to the property "absolutely free".

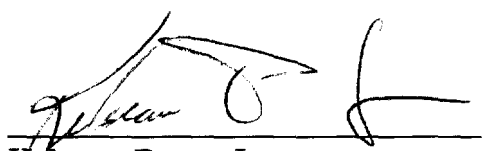
OpTel has not connected any resident to OpTel's service that expressed a desire to remain a customer of MediaOne. In fact, as evidenced by the enclosed notice, residents were advised that if they would like to continue receiving MediaOne's services, they could simply unhook their television set from OpTel's outlet and connect it to MediaOne's outlet. Further, residents were reminded by OpTel and property management that it is the residents' responsibility to cancel their account with MediaOne if they choose to do so. By providing a separate OpTel outlet in each unit, OpTel has made sure that all residents would have the right to chose their cable service provider. I am not aware that anyone has advised residents that they either must receive service from OpTel or terminate service from MediaOne.

1111 W. Mockingbird Lane Dallas, TX 75247 USA Tel: (214) 634-3800 Fax: (214) 634-3838

A Vidéotron Company

CERTIFICATE OF SERVICE

I, Kelseau Powe, Jr., do hereby certify that on this 25th day of September, 1997, I have caused a copy of the foregoing **COMMENTS OF U S WEST, INC.** to be served, via hand-delivery, upon the persons listed on the attached service list.



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